

§516.42

32 CFR Ch. V (7–1–07 Edition)

(See United States ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951));

(2) Inform the court or tribunal that the requesting individual has not complied with this Chapter, as set out in 32 CFR 97 & 516, or that the subpoena or order is being reviewed;

(3) Seek to stay the subpoena or order pending the requestor's compliance with this chapter or final determination by Litigation Division; and,

(4) If the court or other tribunal declines to quash or stay the subpoena or order, inform Litigation Division immediately so a decision can be made whether to challenge the subpoena or order. If Litigation Division decides not to challenge the subpoena or order, the affected personnel will comply with the subpoena or order. If Litigation Division decides to challenge the subpoena or order, it will direct the affected personnel to respectfully decline to comply with the subpoena or order. (See United States ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951)).

(g) *Classified or sensitive information.* Only Litigation Division may authorize the release of official information or appearance of DA personnel as witnesses in litigation involving terrorism, espionage, nuclear weapons, or intelligence sources and methods.

(h) *Requests for Inspector General records or testimony.* IG records, and information obtained through performance of IG duties, are official information under the exclusive control of the Secretary of the Army. (See AR 20–1, Chapter 3.) IG records frequently contain sensitive official information that may be classified or obtained under guarantees of confidentiality. When justification exists, DA attorneys will seek court protection from disclosure of IG records and information. No DA personnel will release IG records or disclose information obtained through performance of IG duties without the approval of The Secretary of the Army, The Inspector General, TIG Legal Advisor, or Chief, Litigation Division. When IG personnel receive a subpoena, court order, request for attendance at a judicial or quasi-judicial proceeding, or a request for an interview which the IG reasonably believes is related to actual or potential litigation concerning IG records or related information, they

should immediately notify the Inspector General Legal Adviser or the Chief, Litigation Division. IG personnel will follow the guidance of this subpart concerning actions to be taken regarding disclosure and testimony.

§516.42 Reference to HQDA.

(a) *General.* If the SJA or legal adviser is unable to resolve the matter, it will be referred for approval or action by Litigation Division under this chapter, by the most expeditious means, to General Litigation Branch, Litigation Division, with the following exceptions:

(1) Those involving a case assigned to another branch of Litigation Division will be submitted to that branch (appendix B to this part).

(2) Those involving affirmative litigation (for example, medical care recovery or Army property damage or loss cases) under subpart E will be submitted to Tort Branch.

(3) Those involving patents, copyrights, privately developed technical information, or trademarks will be submitted to Intellectual Property Law Division.

(4) Those involving taxation will be submitted to Contract Law Division.

(5) Those involving communication, transportation, or utility service proceedings will be submitted to the Regulatory Law Office.

(6) Those involving environmental matters will be submitted to the Environmental Law Division.

(7) Those involving contract appeals cases before the ASBCA will be submitted to the Contract Appeals Division.

(8) Those involving procurement fraud, including Qui Tam cases, will be submitted to the Procurement Fraud Division.

(b) *Information to be submitted.* When referring matters pursuant to paragraph (a) of this section, the following data should be provided:

(1) Parties (named or prospective) to the proceeding, their attorneys, and case number, where appropriate.

(2) Party making the request (if a subpoena, indicate moving party) and his attorney.

(3) Name of tribunal in which the proceeding is pending.

Department of the Army, DoD

§ 516.45

- (4) Nature of the proceeding.
- (5) Date of receipt of request or date and place of service of subpoena.
- (6) Name, grade, position, and organization of person receiving request or served with subpoena.
- (7) Date, time, and place designated in request or subpoena for production of information or appearance of witness.
- (8) Nature of information sought or document requested, and place where document is maintained.
- (9) A copy of each document requested. Contact the appropriate office at HQDA if this would be burdensome and unnecessary to a decision whether to release, redact, or withhold a particular document.
- (10) Name of requested witness, expected testimony, requested appearance time and date, and whether witness is reasonably available.
- (11) Analysis of the problem with recommendations.

RELEASE OF RECORDS IN CONNECTION WITH LITIGATION

§ 516.43 Release of Army and other agency records.

- (a) *Preservation of originals.* To preserve the integrity of DA records, DA personnel will submit properly authenticated copies rather than originals of documents or records for use in legal proceedings, unless directed otherwise by Litigation Division. (See 28 U.S.C. 1733.)
- (b) *Authentication of copies.* Copies of DA records approved for release can be authenticated for introduction in evidence by use of DA Form 4. (See § 516.25 for instructions.)
- (1) Records maintained in U.S. Army Engineer Districts and Divisions will be forwarded to HQDA(CECC-K), WASH DC 20314-1000.
- (2) All other records will be forwarded to the appropriate office at HQDA (See § 516.42).
- (c) *Fees and charges.* AR 37-60 prescribes the schedule of fees and charges for searching, copying, and certifying Army records for release in response to litigation-related requests.
- (d) *Release of records of other agencies.* Normally an individual requesting records originating in agencies outside DA (that is, FBI reports, local police

reports, civilian hospital records) that are also included in Army records should be advised to direct his inquiry to the originating agency.

§ 516.44 Determination of release authorization.

- (a) *Policy.* DA policy is to make official information reasonably available for use in Federal and state courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure.
- (b) *Releasability factors.* In deciding whether to authorize release of official information, the deciding official should consider the following:
 - (1) Has the requester complied with DA policy governing the release of official documents in § 516.41(d) of this part.
 - (2) Is the request unduly burdensome or otherwise inappropriate under the applicable court rules?
 - (3) Is the disclosure appropriate under the rules of procedure governing the matter in which the request arose?
 - (4) Would the disclosure violate a statute, executive order, regulation, or directive?
 - (5) Is the disclosure appropriate under the relevant substantive law concerning privilege?
 - (6) Would the disclosure reveal information properly classified pursuant to the DOD Information Security Program under AR 380-5, unclassified technical data withheld from public release pursuant to 32 CFR § 250, or other matters exempt from unrestricted disclosure?
 - (7) Would disclosure interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or confidential commercial or financial information, or, otherwise be inappropriate under the circumstances?
 - (8) Would the disclosure violate any person's expectation of confidentiality or privacy?

§ 516.45 Records determined to be releasable.

If the deciding official, after considering the factors set forth in § 536.44,